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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 168

FREDERICK C. OVERBURY,

Petitioner,

vs.

JOHN W. PLATTEN AND KINTZING P. EMMONS, INDIVIDUALLY AND AS EXECUTORS AND TRUSTEES OF AND UNDER THE WILL OF CHARLES L. DENISON, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF SAME.

EDWARD V. CONWELL,
Counsel for Petitioner.

FRANK W. JACKSON,
Of Counsel.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

The petitioner, Frederick C. Overbury, by Edward V. Conwell, Esq., his attorney, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals, Second Circuit, entered in the above entitled cause on December 16, 1939 (R. 121), affirming a directed judgment by the District Court for the Southern District of New York, after a trial before a jury on April 4 and 5, 1939 (R. 69, f. 206; R. 112).

A rehearing, duly applied for, was denied on January 23, 1940 (R. 120).

Time within which to file the present petition was extended for a period of 60 days from April 23, 1940, by an order of Mr. Justice Stone dated April 18, 1940 (R. 122). The petition was filed June 18, 1940.

Summary and Statement of the Matter Involved.

The action which petitioner respectfully asks this Court to review is for breach of contract (R. 4) and for conversion of petitioner's stock pledged with respondents to secure its performance (R. 8). Petitioner was the plaintiff in the District Court and the appellant in the Circuit Court of Appeals.

The matter involved will be clarified by giving the substance of an earlier transaction between the same original parties, pleaded as a defense at page 15 of the record.

In July, August and September, 1928, petitioner made and delivered a series of collateral notes to Charles L. Denison, amounting in all to $55,500, and secured these notes by pledging 6,000 shares of stock of the Teck-Hughes Gold Mines, Ltd. (Condensed from Ex. E, R. 97-100, and Ex. H, R. 108, fols. 322, 323 [R. 47, 48]).

Two years later, June 30, 1930, petitioner in another and independent transaction made a written agreement with Denison to buy from him 200 shares of Aluminum stock for $48,960 and interest, and pledged 1,574 shares of his Flintkote stock to secure the faithful performance of the agreement (Ex. 1, R. 70; R. 29). The contract says 1,500 shares, but there is no dispute that 1,574 shares were pledged (R. 17, f. 49).

Denison died the same year and both of these transactions came into the hands of respondents as executors and trustees (Ex. E, R. 94, f. 282; R. 47).

As to the 1928 transaction. Respondents transferred the Teck-Hughes notes to William C. Farley on November 2, 1935 (Ex. E, R. 99, fols. 295-6, 100, f. 298; R. 47) and Farley with the knowledge, consent and aid of respondents and their attorneys (R. 57-60, fols. 171-174, 177, 178; 75, f. 225; 100, f. 299), procured an attachment to be levied on November 4, 1935 (Ex. 9, R. 82; R. 60) upon the 1,574 shares of Flintkote stock pledged with respondents (Ex. H, R. 108, fols. 322-3; R. 48). On the same day an action was commenced in New York Supreme Court, Kings County, which resulted in a judgment against petitioner on October 20, 1938 (R. 85). This judgment has since been reversed, as mentioned in more detail below.

As to the Aluminum transaction. Respondents twice modified this agreement as to time of its performance, ultimately making its performance dependent solely on five days notice of readiness to be given by respondents to Overbury (Ex. 2, R. 72; R. 29; Ex. 3, R. 73, f. 219; R. 29; Ex. 4, R. 74; R. 30).

This notice was given on March 2, 1936, with an unconditional demand that petitioner perform on March 19, 1936 (Ex. 4, R. 74, fols. 211, 222; R. 30).

Petitioner duly made full tender of performance (Ex. 5, R. 76; R. 30) which respondents rejected (Ex. 6, R. 77-8, fols. 231, 2; R. 30), assigning as their reason that they "felt themselves bound to respect that attachment" (R. 41, f. 122) which they had procured to be levied on November 4, 1935, more than four months before. This tender and refusal was on March 19, 1936. On March 25, 1936, without further notice, respondents sold 500 shares of Flintkote stock and voluntarily delivered the remaining 1,074 shares to the Sheriff (Ex. D, R. 99; R. 31).

Out of respondents' notice of readiness and demand that petitioner perform his contract, their rejection of peti-

tioner's tender pursuant thereto, and their subsequent disposition of the pledged Flintkote, the action herein arose.

Questions Presented.

I. (A) Whether promissors (respondents here) who have served notice of readiness pursuant to the terms of the contract, and have unconditionally demanded performance by the promisee (petitioner here) have thereby made a binding representation that they are ready, willing and able to perform on their part if the promisee performs on his part?

The Court of Appeals of the State of New York, in *Peck* v. *Collins*, 70 N. Y. 376, 382, has held in the affirmative in these words: "Notice of readiness requires readiness, and implies ability to perform".

The Circuit Court of Appeals has said that "The defendants refused to deliver the Flintkote shares, justifying their refusal because of an attachment levied on November 4, 1935 * * *" (R. 116) and has held that "the lien (of the attachment) was valid at the time of their refusal" (R. 119), and by implication has held here that respondents were not bound to anything by their notice of readiness to perform the contract. Thus the Circuit Court appears to have answered Question A in the negative.

B. Whether the promisee (petitioner) who has duly tendered under the demand, can be put in default if the promissors (respondents) gave their notice untruly and were not in fact ready?

The Court of Appeals in the State of New York, in *Mansfield* v. *N. Y. C. & H. R. R. R. Co.*, 102 N. Y. 205, 211, has held—"If he (the promissor) was not in fact ready, neglect to perform on the part of the other party constitutes no default", hence it has answered "no".

The Circuit Court of Appeals has held in this case that "the lien (of the attachment) was valid at the time of their

refusal" (R. 119), and by implication that the sale of petitioner's property after demand and refusal by respondents was valid, and hence it answers "yes".

Thus the decision of the Circuit Court of Appeals is probably in conflict with the decisions in the New York State Courts.

The said decision is also in conflict with the weight of authority in the law of contracts on the general question of demand and refusal.

II. This action was tried on April 4 and 5, 1939, on amended pleadings (R. 4-27, 112). In the meantime, the action in Kings County had terminated in a judgment against petitioner (R. 85-6). Respondents had pleaded this judgment as a special defense to the amended complaint (R. 20, 21, fols. 60, 61) and petitioner pleaded in reply that the judgment had been procured by preventing him from proving at the trial that the notes involved had been paid by the sale of the securities by the firm of which the defendant Emmons was a partner (R. 27). Appeal from this judgment was pending at the time when the Circuit Court of Appeals heard the argument (R. 117). This judgment has since been reversed and a new trial granted (decision New York Appellate Division, 2nd Dept., New York Law Journal of February 19, 1940). The appeal has been reargued, decision upon which is now pending.

Under such conditions, THE QUESTION is—Whether an obligee (petitioner here) in a contract with the obligors (respondents) is compelled to treat a disputed claim of debt arising out of an independent transaction between the same parties, as an established debt, and to pay the same on demand or forfeit his rights under the contract?

The Circuit Court of Appeals has held in substance here that the respondents were free to attach petitioner's stock pledged with them and that the prevention of its delivery

is not to be attributed to their own act, but to the act of petitioner for his failure to pay the amount demanded in the Kings County complaint as an established debt (R. 118-119).

The said decision appears to be in conflict with the rule of law laid down by the New York Court of Appeals in *Patterson* v. *Meyerhofer*, 204 N. Y. 96, 100, 101, and with "Restatement of the Law of Contracts" in *Amies* v. *Wesnofske*, 255 N. Y. 156, 163.

III. An attachment and levy having been subsequently vacated and set aside (*Farley* v. *Overbury*, 252 App. Div. (N. Y.) 882, THE QUESTION—whether the persons who procured the attachment to be issued in the name of another party plaintiff and not in their own names, and whether their attorneys, who are paid by them to procure the attachment and represent the plaintiff in the action, are acting in good faith and without knowledge that the attachment and levy under it were invalid, is a matter to be determined by the jury, and not by the court?

It is respectfully submitted that the Circuit Court of Appeals has decided important questions of contract law probably in conflict with decisions in the highest court of the State of New York, and in a way probably untenable or in conflict with the weight of authority, which should be settled by this Court for the common welfare.

Dated New York, June 11, 1940.

Respectfully submitted,

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